Study T-103 May 24, 2011

Memorandum 2011-25

Technical and Minor Substantive Corrections: Statutory Cross-References to "Tort Claims Act" (Comments on Tentative Recommendation)

In February, the Commission approved a tentative recommendation proposing to (1) replace the term "Tort Claims Act" with "Government Claims Act" throughout the codes, and (2) amend the first section of Division 3.6 of Title 1 of the Government Code to expressly state that the division may be referred to as the "Government Claims Act." The tentative recommendation was posted to the Commission's website and widely circulated for comment, with a comment deadline of May 15. The Commission received only the following comment:

Further input is still welcome. This memorandum briefly describes the proposal and its background, and analyzes the comment received.

BACKGROUND AND CONTENT OF THE TENTATIVE RECOMMENDATION

Division 3.6 (commencing with Section 810) of Title 1 of the Government Code is sometimes referred to as the California "Tort Claims Act." That name is misleading, however, because Division 3.6 is not limited to tort claims. It also encompasses certain types of contract claims against public entities and public employees.

To help prevent confusion regarding the scope of the Act, the California Supreme Court rejected the name "Tort Claims Act" and endorsed the term "Government Claims Act" instead. *See City of Stockton v. Superior Court*, 42 Cal. 4th 730, 734, 741-42. Several courts of appeal had previously reached the same conclusion. *See, e.g., Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 751 n.3, 120 Cal. Rptr. 2d 550 (2002); *Baines Pickwick Ltd. v. City of Los Angeles*, 72 Cal. App. 4th

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

298, 302-03, 85 Cal. Rptr. 2d 74 (1999); *Hart v. Alameda County*, 76 Cal. App. 4th 766, 774 n.2, 90 Cal. Rptr. 2d 386 (1999).

Prof. William Slomanson (Thomas Jefferson School of Law) alerted the Commission to this terminological issue and pointed out that "Tort Claims Act" is used in some code provisions. He suggested replacing that misleading term with "Government Claims Act," the more accurate term preferred by the courts. See Memorandum 2009-38, pp. 38-39 & Exhibit p. 30.

The Commission initially referred the matter to the Office of Legislative Counsel, for possible inclusion in the 2010 maintenance of the codes bill. On learning that this bill would not be an appropriate vehicle, the Commission decided to study the matter itself (on a low priority basis), pursuant to its authority to "study and recommend revisions to correct technical or minor substantive defects in the statutes of the state …." Gov't Code § 8298; see Memorandum 2010-39, pp. 6, 42; Minutes (Oct. 2010), p. 3.

Because the project is relatively simple and straightforward, the staff was able to assign the initial research to a volunteer (Michael Lew) who recently graduated from law school. He found six code provisions that use the phrase "Tort Claims Act." See Memorandum 2011-9.

The tentative recommendation proposes to replace each of those references with the term "Government Claims Act." The tentative recommendation also proposes to amend Government Code Section 810 to officially adopt "Government Claims Act" as a short-hand way of referring to Division 3.6 of Title 1 of the Government Claims Act:

> **Gov't Code § 810 (amended). Short title and application of definitions**
>
> 810. (a) Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.
>
> (b) This division may be referred to as the "Government Claims Act."
>
> **Comment.** Section 810 is amended to adopt the short title "Government Claims Act." For background, see City of Stockton v. Superior Court, 42 Cal. 4th 730, 734, 741-42, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007).

COMMENT RECEIVED

Robert Burns, a San Diego attorney, submitted a sharply negative comment on the tentative recommendation. He wrote:

> [T]he Commission is studying whether to replace "Tort Claims Act" with "Government Claims Act" (the term preferred by the California Supreme Court) throughout the codes. SET AN EXAMPLE TO THIS BANKRUPT STATE AND GET OFF OF IT. First of all, "claims" is facially overbroad. Second of all we cannot afford this diversion of underfunded governmental resources even if you were on a legitimate mission. Why don't you instead study whether the statute of limitations discriminatorily placed on most governmental tort claims needs to be changed/regularized and study whether government claims are unreasonably pushed into expensive underfunded party-subsidized litigation.

Exhibit p. 1.

ANALYSIS

Mr. Burns states, without explanation, that the term "claims" is "facially overbroad." The staff is not sure what he means by this comment. If anything, the reference to "claims" is more narrow than the scope of Division 3.6, which is entitled "Claims *and Actions* Against Public Entities and Public Employees." (Emphasis added.)

Further, this point seems irrelevant in determining whether to replace "Tort Claims Act" with "Government Claims Act." Both phrases include the word "claims," so any vulnerability of that word is not a basis for selecting one phrase over the other.

Mr. Burns also maintains that this project is not a good use of government resources. He urges the Commission to instead consider more weighty topics, such as whether to change the statute of limitations for governmental tort claims, or whether "government claims are unreasonably pushed into expensive underfunded party-subsidized litigation."

The Commission is not currently authorized to study the topics Mr. Burns suggests. See 2009 Cal. Stat. res. ch. 98. If the Commission wishes, the staff will discuss those topics and the possibility of requesting such authority in next fall's memorandum on new topics and priorities.

Our initial impression, however, is that those topics would prove quite controversial, making it difficult if not impossible to forge any effective

consensus. Such topics are usually inappropriate for the Commission, because they consume extensive resources, are unlikely to lead to any improvement in the law, and involve policy choices that should be made by elected representatives rather than the members of the Commission.

In contrast, the current study has consumed hardly any resources and is not likely to require much future effort. The proposal is too minor to warrant a standalone bill; it might instead be suitable for a vehicle such as the annual civil omnibus bill, which combines a number of minor reforms and generally goes through the legislative process without difficulty. Based on current information, the likelihood of enactment seems reasonably good. The proposed approach is already being used by the courts, was suggested to the Commission by Prof. Slomanson, and has generated no opposition aside from the comments of Mr. Burns. Although the proposal would not effect a major change in the law, it would help to prevent confusion over the scope of Division 3.6, and would thus conserve the resources of courts and litigants (plaintiffs as well as defendants). It may only be a small step forward, but the staff believes it is worth pursuing, at least unless and until some significant obstacle surfaces.

Does the Commission want to approve the proposal (with or without revisions) as a final recommendation, for printing and submission to the Legislature?

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM ROBERT BURNS (3/28/11)

Re: Commission Astray

In response to the what I read at http://www.clrc.ca.gov/T103.html#Tentative relating to the Commission studying the common practice of referring to Division 3.6 of Title 1 of the Government Code as the California "Tort Claims Act." In particular, the Commission is studying whether to replace "Tort Claims Act" with "Government Claims Act" (the term preferred by the California Supreme Court) throughout the codes. SET AN EXAMPLE TO THIS BANKRUPT STATE AND GET OFF OF IT. First of all, "claims" is facially overbroad. Second of all we cannot afford this diversion of underfunded governmental resources even if you were on a legitimate mission. Why don't you instead study whether the statute of limitations discriminatorily placed on most governmental tort claims needs to be changed/regularized and study whether government claims are unreasonably pushed into expensive underfunded party-subsidized litigation.

Robert Burns, Attorney & Counselor at Law
California Bar Assn. No. 91489
4877 Voltaire Street
P.O.B. 7263
Ocean Beach (San Diego), CA U.S.A. 92167
(619) 223-0441 (voice)
(847) 557-1220 (e-Fax)

E-Mail: <RobertBurns@OBLaw.com> TM
URL: http://www.OBLaw.com TM

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